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Telford Lands LLC v. Cain Appellant's Reply Brief Dckt. 39466

IN THE SUPREME COURT OF THE STATE OF IDAHO

TELFORD LANDS LLC, an Idaho Limited liability company, MITCHELL D. SORENSEN, an individual, and PU RANCH, a general partnership, Plaintiffs/Respondents, v. DONALD WILLIAM CAIN and CAROLYN RUTH CAIN, husband and wife, and JOHN DOES 1-20, individuals, and JANE DOES 1-20, individuals, Defendants/Appellants.	**Supreme Court Docket No. 39466-2011** Butte County Case No. CV 2010-64

APPELLANTS' REPLY BRIEF

Appeal from the District Court of the Fifth Judicial District of the State of Idaho, in and for Butte County

Honorable Joel E. Tingey, District Judge, Presiding

Gary D. Slette
ROBERTSON & SLETTE, PLLC
P.O. Box 1906
Twin Falls, ID 83303-1906
Attorneys for Appellants

Robert L. Harris
HOLDEN KIDWELL HAHN & CRAPO, PLLC
P.O. Box 50130
Idaho Falls, ID 83405-0130
Attorneys for Respondents

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

CASES

STATUTES

I. STATEMENT OF THE CASE

A dispassionate reading of I.A.R. Rule 35(b)(3) indicates that a respondent is to provide a statement of the case to the extent it "disagrees with the statement of the case set forth in appellant's brief." From a review of the first ten pages of the Ranchers' Brief, two things are apparent. First, their dissertation does not provide this Court with any explanation of any disagreement with the Cains' statement of the case. Rather, the Ranchers have simply taken an opportunity to assert many unverified allegations of their Complaint as the "facts" in this appeal. Second, the Ranchers' use of those unverified allegations as factual matters appears to be inconsistent with prior Court holdings. Evidence of facts presented to the court in support of a motion for summary judgment must be admissible evidence. *Bromley v. Garey*, 132 Idaho 807, 979 P.2d 1165 (1999). Presumably, the Court would prefer to operate from a fairly unified set of facts predicated on matters which are established by credible evidence. That is why any areas of disagreement that a respondent has with the facts as stated by an appellant should be recited in accordance with I.A.R. Rule 35(b)(3).

Notwithstanding that the words "ranch", "land" and "livestock" are contained in their names, and notwithstanding that I.A.R. Rule 35(d) expressly compels a different approach, the Ranchers have expressly made it a point that they do not want to be called "Ranchers," but rather, prefer to refer to themselves as "Respondents", and to the Cains as "Appellants". Given the number of appeals considered by the Court, it is understandable why I.A.R. Rule 35(d) was adopted. Despite the objection contained in footnote 1 on page 1 of the Respondents' Brief, the Cains will continue to refer to them as Ranchers in this Reply Brief.

II. REPLY ARGUMENT

A. The Harris and Rindfleisch Affidavits.

In oral argument, the Cains characterized the submission of the hand-written notes of the Ranchers' attorney as an anomaly because it would have the effect of making the affiant a fact witness in the case. Tr., 10/13/2010 at p. 105, LL. 16-25. Judge Tingey did not exclude or strike the hand-written notes contained in the Harris Affidavit; rather, he concluded that, as far as he was concerned, the notes were "not probative." If this Court is free on appeal to draw its own conclusions from the evidence presented, the probative value of the hand-written notes of the Ranchers' own counsel can be determined by this Court. From the Cains' perspective, those notes set forth a virtual roadmap of factual matters that support the Cains' arguments regarding a lack of necessity to support the Ranchers' eminent domain claim. The wisdom of including those notes is not at issue in this appeal, but their content is certainly relevant and probative.

Although certain portions of the Rindfleisch Affidavit were stricken on the basis of a lack of foundation, his deposition was not. Paragraph 4 of the Rindlfeisch Affidavit stated:

> 4. In 2005, Plaintiff Sorenson applied for a transfer of a water right with the Idaho Department of Water Resources that relied upon the use of the District's facilities. The District questioned the water right being transferred and was concerned about a possible expansion of the right. In response, the District's then-manager wrote a letter to IDWR advising it that no transport agreement existed for the water right and setting out other concerns. This response was not a denial of a transport agreement, but was rather a response to a request for transfer of a water right. To my knowledge, no request for a transport agreement for this water right has ever been filed with the District by Sorensen.

Judge Tingey struck all of paragraph 4, except for the last sentence, on the basis of a lack of

foundation. Memorandum Decision and Order, R., Vol. 4, p. 677.

Paragraph 6 of the Rindfleisch Affidavit stated:

> 6. The transport agreements referred to in the Settlement Agreement of June 30, 2009, remained in effect during the 2009 irrigation season pursuant to the terms of the Settlement Agreement, and any termination of those transport agreements was at the request of the Plaintiffs, and not the District. It was my understanding that Plaintiffs terminated the transport agreements because they were unhappy with the conveyance losses resulting from the use of the District's system.

Judge Tingey struck the entirety of paragraph 6 of the Rindfleisch Affidavit on the basis of a lack of foundation. *Id.* The Ranchers tacitly acknowledged that a proper foundation would be needed to overcome that objection. R., Vol. 4, p. 647. That is precisely what the Cains did.

Pursuant to I.R.C.P. Rule 56(e), the Rindfleisch Affidavit was supplemented by his deposition taken on December 3, 2010, following the entry of that Memorandum Decision. With regard to paragraph 4 of the Rindfleisch Affidavit, it is especially noteworthy that Sorensen's application, and the letter referenced therein, were both included in the record in another affidavit submitted by the Ranchers' counsel. R., Vol. 1, pp. 111-115. Mr. Rindfleisch testified in his deposition that, as the General Manager of the BLRID, he was the custodian of the District's records and had reviewed documents in the District's files in order to gain personal knowledge of the facts set forth in his Affidavit. Rindfleisch Deposition, p. 11, LL. 7-15; p. 11, LL. 23-25; p. 12, LL. 1-7. His responsibility of being the custodian of all the District's records and its property was consistent with the duties of the General Manager as set forth in the BLRID Bylaws. Pursuant to those Bylaws, the General Manager is "to take charge of all property belonging to the District" and "to have general charge of the distribution of water

furnished by the District to consumers and also general charge of the canals and laterals belonging to the District, and the care and maintenance of the same." R., Vol. 8, p. 14, LL. 27-28. A quasi-governmental entity such as the BLRID does not suffer from institutional amnesia because a new manager becomes custodian of its records. With regard to paragraph 6 of his Affidavit, Mr. Rindfleisch testified in his deposition that he was present at all of the meetings where settlement discussions with the Ranchers and the BLRID Board were undertaken in order to arrive at the Settlement Agreement. Rindfleisch Deposition, pp. 14-16, R., Vol. 4, p. 794. Additionally, he was a participant in the Board's executive session meeting where the settlement was discussed leading to its ultimate execution. *Id.* As a participant in all those meetings, he testified under oath in his deposition that there was no reason that the BLRID would have wanted those two GW Transport Agreements with the Ranchers terminated, and that the two GW Transport Agreements were terminated at the request of Telford and PU Ranch. Rindfleisch Deposition, p. 19, LL. 1-9, R., Vol. 4, p. 795. He testified that the two GW Transport Agreements were valid during all of 2009. Rindfleisch Deposition, p. 18, LL. 4-6, R., Vol. 4, p. 795. He knew that Telford and PU Ranch reserved the right to utilize the two GW Transport Agreements "if the shrinkage was too bad when they put it in the [UC] Canal." Rindfleisch Deposition, p. 21, LL. 12-25; and p. 22, LL. 1-7, R., Vol. 4, pp. 795-96.

To the extent that a citation in the Cains' opening Brief has referred to a stricken portion of the Rindfleisch Affidavit, it is apparent that Mr. Rindfleisch's deposition testimony established the requisite foundation for the statements he made. The Cains found only one reference to a stricken portion of the Rindfleisch Affidavit at p. 19, L. 16 of their opening Brief,

which reference was a parallel citation to the deposition testimony of Mr. Rindfleisch. Having attended all the meetings of the BLRID Board, including the executive sessions, the logical individual to testify on these matters was the District's General Manager. He testified that there was no reason why the District would have wanted those two GW Transport Agreements terminated; that those agreements were terminated at the behest of Telford and PU Ranch; that the Moore Canal had capacity to transport the Ranchers' water rights as it was doing in their five other transport agreements, and that the District was ready, willing and able to do so.

Consistent with *Bromley, supra*, the Cains were entitled to produce the deposition of James Rindfleisch as admissible evidence in this matter. The Cains understand why the Ranchers are so adamant about not wanting Mr. Rindfleisch's statements considered, because they clearly establish the fact that the Ranchers were the ones who wanted those two specific GW Transport Agreements terminated in order to create an alleged necessity. The same is true for the attorney notes appended to the Harris Affidavit which were never excluded or stricken from the record by the court, contrary to the Ranchers' assertion. The notes clearly laid out the Ranchers' plan to "terminate existing GW [agreements]," and their need for two perpetual easements with the notations to "make sure," "only by," and "protect us." Simply stated, the Ranchers wanted just two of their seven transport agreements terminated, and they needed to make certain that they obtained perpetual easements through two landowners because a perpetual easement was the only method by which they could protect themselves. R., Vol. 3, p. 447. Finally, the notes acknowledged that those two GW Transport Agreements would "sunset on their own @ end of this year." *Id.* at p. 450.

B. Factual Matters and Due Process.

As discussed above, the recitation of facts by reference to the Ranchers' unverified Complaint hardly seems appropriate. This case was first brought to the court on a Motion for Temporary Restraining Order and Preliminary Injunction based upon that unverified Complaint. The transcript from that hearing discloses some interesting factual contentions that led to the court's issuance of the preliminary injunction. The Ranchers acknowledged that they had historically put their water into the Moore Canal in order to carry it to their property, but "decided that it would be **in their best interests to** construct a common pipeline." (Emphasis added). Tr., 5/19/2010, p. 3, LL. 1-6. The Ranchers' "whole idea was to divorce themselves from the Irrigation District so that they could control their own water, control their own conveyance losses, do everything they needed to do." *Id.* at p. 5, LL. 3-7. (Of course, it is apparent that their "divorce" was only a partial separation given the existence of the five other transport agreements that were in effect between the Ranchers and the District.) Despite the Harris notes indicating that perpetual easements over intervening land owners' property were the only mechanism by which the Ranchers could be protected, the Ranchers asserted to the court that they obtained some form of oral real property interest when Don Cain allegedly answered, "Absolutely," when Boyd Burnett asked if they could "put in this pipeline." *Id.* at p. 5, LL. 14-15. Don Cain's version of the facts differed markedly in that he stated that he advised Burnett to come back later to discuss it. *Id.* at p. 14, LL. 13-15. That statement squared with the report from the Butte County Sheriff's Office. *Id.* at p. 24, LL. 18-25; p. 25, LL. 1-5. Any suggestion that Mr. Cain verbally consented to the installation of a pipeline on his property, and

subsequently changed his mind, was certainly a disputed fact, contrary to the Ranchers' statement of facts contained in paragraph 4 on page 4 of their Brief. That difference was the basis for the district court's grant of the Cains' Motion for Summary Judgment on Count 1 of the Ranchers' Complaint. *See* Memorandum Decision at R., Vol. 4, pp. 683-84. The Ranchers did not cross-appeal that determination. The Ranchers have also included an erroneous "statement of fact" in that same paragraph that "if an easement document was necessary in the future, Appellants [Cains] would provide the same." That argument was also summarily rejected by the district court. *Id.* In his deposition, Mr. Burnett stated that Cain "did not want to sign an easement," and that "he didn't want to sell the property." Burnett Deposition, p. 22, LL. 16-24, R., Vol. 1, p. 173.

The Ranchers confirmed that they could have diverted their water into the Moore Canal in 2009 after the pipeline was constructed, but they chose not to do so. Tr., 5/19/2010 at p. 22, LL. 10-12. The Ranchers twice unabashedly asserted that their pipeline would not burden the Cains' property more than it had already been burdened. Tr., 5/19/2010 at p. 27, LL. 19-21; and p. 28, LL. 12-13. Finally, in arguing to the court regarding the burden to the Cains' property, the Ranchers asserted:

> And in terms of the burden to his property, if he has any imminent plans to develop it this year, then I think that might be an issue; but I don't think he's indicated that today. He said sometime in the future he might.

Id. at p. 31, LL. 10-14. The Cains can perceive no reason why there would be any difference if there was a development plan this year or ten years from now. It was still the taking of private property.

Despite the fact that the Complaint was not verified, that no witnesses were called, and that no evidence was introduced through witnesses, a preliminary injunction was entered by the court requiring the Ranchers' pipeline to remain in place on the Cains' property.

At that point in time, the Cains decided they needed to obtain legal counsel to seek reconsideration of the preliminary injunction. R., Vol. 1, pp. 36-38. Although the Ranchers have asserted that due process issues in this case were never raised below, the Cains' brief on reconsideration of the preliminary injunction expressly referred to "due process," and cited *Lawrence Warehouse Co. v. Rudio Lumber Co.*, 89 Idaho 389, 405 P.2d 634 (1965) in support of arguments in that regard. *Id.* at p. 37, LL. 17-25. In addition to placing the issue squarely before the court in their written motion, the Cains also argued notice and an opportunity to be heard consistent with *Lawrence, supra.* Tr., 6/16/2010, p. 55, LL. 2-13. The Cains' arguments were rejected, with the district court determining that it could enter a preliminary injunction without being required to take evidence of any sort. *Id.* at p. 55, LL. 17-19. Additionally, the court concluded that a complaint need not be verified in order to issue a preliminary injunction. *Id.* at p. 55, LL. 14-17. It is clear that the issue of due process was raised below, and consistent with *Kolar v. Cassia County*, 142 Idaho 346, 127 P.3d 962 (2005), as specifically cited in the Ranchers' Brief, this issue can be addressed on appeal.

Throughout this case the Ranchers have unhesitatingly acknowledged that the pipeline was installed in June of 2009. Tr., 10/13/2010, p. 75, LL. 11-12. Their Complaint was filed almost a year later on May 17, 2010. R., Vol. 8, p. 1274. The Fifth Amendment to the Constitution of the United States provides, in pertinent part, as follows:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

Article I, § 13 of the Constitution of the State of Idaho provides:

> No person shall be . . . deprived of life, liberty or property without due process of law.

The process of law for an eminent domain proceeding is outlined in Title 7 of the Idaho Code. The Cains argued to the district court that the process employed by the Ranchers was inconsistent, as a matter of law, with the requirements of Title 7. *See, e.g.*, R., Vol. 5, p. 870, LL. 16-26. In *Callies v. O'Neal*, 147 Idaho 841, 216 P.3d 130 (2009), this Court stated:

> When questions of law are presented on a motion for summary judgment, "this Court exercises free review and is not bound by findings of the district court but is free to draw its own conclusions from the evidence presented." *Lettunich v. Key Bank Nat'l Ass'n*, 141 Idaho 362, 366, 109 P.3d 1104, 1108 (2005). Thus, the Court independently reviews the trial court's resolution of "whether a genuine issue of material fact exists and whether the prevailing party was entitled to judgment as a matter of law." *Doe v. City of Elk River*, 144 Idaho 337, 338, 160 P.3d 1272, 1273 (2007)."

147 Idaho at 846.

Because due process issues were raised below, this Court should consider the arguments of the Cains on appeal with a logical conclusion that their due process rights were violated when the Ranchers trespassed on their property, and then obtained a preliminary injunction and an order of eminent domain without compliance with the relevant statutes.

C. Easement vs. Water Right Issues.

The Ranchers have devoted portions of their Brief to the argument that because the elements of a water right in an adjudication do not necessarily contain conditions of approval

for a water right application or transfer, such conditions are therefore rendered meaningless, or are simply mere suggestions. The Cains stand by their original arguments that the Ranchers have confused conditions of approval of permitted or transferred water rights with the elements of a decree as contained in Idaho's adjudication statutes. The Affidavit of Dr. Charles E. Brockway further explains the difference between (a) the elements of a water right in an adjudication and (b) conditions of approval for a water right. R., Vol. 5, p. 813 at ¶¶ 5 through 9, inclusive.

D. The Eminent Domain Issue.

The Ranchers have gone to great lengths in their Brief to justify the court's holding that eminent domain was the appropriate remedy in this case. There is no dispute by the Ranchers that they first took the Cains' property approximately one year prior to their institution of eminent domain proceedings. There is no dispute that the Complaint did not contain a legal description of the property sought to be taken, and that the issue was first raised by the Ranchers at the reconsideration hearing heard by Judge Watkins. Tr., 4/20/2011, p. 21, LL. 16-19. However, the issue of monetary damages was the only issue that was left for determination as indicated in the district court's Memorandum Decision, R., Vol. 4, p. 683. Counsel for the Cains noted the fact that lack of a legal description in the Complaint was raised for the first time during the oral argument on reconsideration. *Id.* at p. 38, LL. 9-20. There is no dispute that the Ranchers sought the court's judgment "determining that Twin Lakes is entitled to take the easement for the Pipeline subject to payment by Twin Lakes to Defendants of just compensation for the easement." R., Vol. 8, p. 1285, ¶ 4. The crux of this case comes down to

the issue of necessity and the steps taken by the Ranchers to create their own necessity. After having their original pipeline forcibly removed from the BLRID culvert and right-of-way, the Ranchers negotiated for the termination of two of their seven transport agreements. Some of those were for groundwater, and some of them were for surface water, and although the Ranchers have contended that there is a difference between ground and surface water to justify their position (Tr., 4/20/2011, p. 26, LL. 13-16), the Cains contend that the termination of those two transport agreements was a mere contrivance to create necessity. The Ranchers consistently acknowledged that they had historically conveyed their water via the Moore Canal, a condition of their water rights as more fully evidenced in the Cains' initial Brief. As argued by the Ranchers:

> So that was what the Court had said is that it would make a more efficient use of their water. Well, what does that translate into? It means that they can better irrigate their land; they can irrigate more acres, because they have more control over it. And that Your Honor is a necessity.

Id. at p. 27, LL. 10-16. The GW Transport Agreements, the Ranchers concluded, were just not good enough for them.

> So the fact that this is used by permission only, it's a license, underscores the need for my clients to have something more than just permission from someone. They need their own easement, and that's why the pipeline was installed.

Id. at p. 29, LL. 24-25; p. 30, LL. 1-3. That same argument was advanced by the Ranchers to Judge Tingey at the summary judgment hearing.

> Permission is not an option. We need to have our own property rights to give us the security that we need.

Tr., 10/13/2010, p. 82, LL. 16-17. In *Cohen v. Larson*, 125 Idaho 82, 867 P.2d 956 (1993), this Court stated:

> This Court has never held that private individuals may take the property of other private individuals in order to enhance their purely private enjoyment of their property.

125 Idaho at 84. In the instant case, it appears that is exactly what the Ranchers have done.

The Ranchers have cited the Court to *Canyon View Irrigation Co. v. Twin Falls Canal Co.*, 101 Idaho 604, 619 P.2d 122 (1980) for the proposition that the "irrigation and reclamation of arid lands is a well recognized public use . . . ." 101 Idaho at 607. Perhaps that is why the Ranchers want the Court to view them as "farmers" so they can be seen as though they are "reclaiming" their land from sagebrush to make it capable of producing crops in order to meet the purpose of the eminent domain statutes. For the record, the Cains note that the words "irrigation and reclamation" are in the conjunctive rather than the disjunctive. Whether or not that be parsing the language too strictly, it seems that may be exactly what was contemplated at Idaho's Constitutional Convention, i.e., that arid desert land could be "reclaimed" and then irrigated to make it into productive agricultural land. In the case of *In the Matter of Drainage District No. 1 of Canyon County v. Farmers Cooperative Canal Co. and the Knobel Ditch Co.*, 29 Idaho 377, 161 P. 315 (1916), the Idaho Supreme Court dealt with a drainage case. Although the facts of that case are dissimilar from the instant case, a statement by the Court is notable.

> It is a well-recognized fact that under many of the irrigation systems of our state thousands of acres of land **which were reclaimed from an arid condition** and which for a time produced valuable crops have now become alkalined or water-logged, and

> thus ruined, and grows nothing but willows and tules because of the seepage of waters from canals and the irrigation of higher lands.

(Emphasis added). 29 Idaho at 395. While the delegates to the Constitutional Convention may have wanted to secure the reclamation of arid lands for their future irrigation, it is doubtful that they ever contemplated a situation where someone who had a license for the conveyance of their water, and had used it for thirty years, could simply terminate that license in order to utilize eminent domain for purposes of obtaining a "superior delivery system" in order to enhance the enjoyment of their property. That is precisely what Telford and PU Ranch did in order to assert a claim for eminent domain. As for Sorensen, even though his water right contained a condition that it would be conveyed via the Moore Canal, he simply opted never to seek a transport agreement for his groundwater right, even though he possessed a transport agreement for his surface water rights. He testified under oath in his deposition that he "could not get a Transport Agreement from the Irrigation District to convey my water right." Sorensen Deposition, p. 46, LL. 10-12, R., Vol. 2, p. 307. However, he had to subsequently admit that he did indeed have other transport agreements with the BLRID in the Moore Canal. *Id.* at p. 55, LL. 9-11, R., Vol. 2, p. 309. He acknowledged having previously seen a copy of the letter from the BLRID which was attached as Exhibit "D" to the Affidavit of Don Cain and referenced therein at paragraph 13, R., Vol. 1, p. 24. A true copy of that letter is attached hereto as **Exhibit "A"**. In that letter the BLRID stated that Sorenson's [sic – Sorensen's] water right could be conveyed in the Moore Canal pursuant to a transport agreement as had been done in the past. Sorensen admitted that he was aware that his water right had previously been transported via

the Moore Canal. Sorensen Deposition, p. 34, LL. 10-21, R., Vol. 2, p. 304. He acknowledged that he was aware that his water right had been acquired with the indication that it was transported via the Moore Canal. *Id.* at p. 35, LL. 4-9. He admitted that he never submitted a request for a transport agreement for his groundwater right. *Id.* at p. 56, LL. 20-25, R., Vol. 2, p. 309. He acknowledged that the pipeline was more convenient than the conveyance in the Moore Canal. *Id.* at p. 46, LL. 5-8, R., Vol. 2, p. 307.

Cains renew their argument that mere convenience, and not necessity, was the basis for the Ranchers' decision to trespass upon the Cains' property for purposes of constructing a pipeline. The deposition of BLRID Manager James Rindfleisch makes it abundantly clear that the two GW Transport Agreements were terminated at the request of Telford and PU Ranch; that the District would have had no reason to terminate those agreements because they brought revenue to the District; and finally, that the District was ready, willing and able to transport these groundwater rights for the Ranchers just as they were doing under five other separate transport agreements with them. It is difficult to comprehend how the Ranchers could have asserted necessity on the basis of the "permissive nature and onerous provisions of the transport agreements" (Respondents' Brief at p. 27), while still availing themselves of the same provisions in other transport agreements. In their Brief, the Ranchers have attempted to distinguish between ground and surface water rights when it comes to transport agreements. (Respondents' Brief at p. 28). The Cains have always taken the position that "water is water," regardless of its source. A molecule of surface water being transported via the Moore Canal is no different than a molecule of groundwater. The Ranchers have disagreed, and have even

suggested that they may return to the courtroom for another round of eminent domain proceedings in the future relative to the transport of their surface water rights.

> However, acceptance of an inferior delivery system for the time being does not mean Respondents [Ranchers] would be prohibited from condemning an easement in the future for these [surface] rights as well.

Respondents' Brief at p. 28. That statement is very telling. The Ranchers' "inferior delivery system" is working just fine, just as the two terminated GW Transport Agreements did over the past thirty years. In their quest for a "superior delivery system," they believe they should have the legal right to take someone else's property in order to enhance their property.

E. Compliance with Title 7 of the Idaho Code.

The Ranchers contend that they have complied with the requirements of Title 7 because they made an offer to purchase the easement on the Cains' property before filing their eminent domain Complaint. The problem, of course, is that the Complaint was filed approximately one year after they had already installed their pipeline on the Cains' property by trespass. According to the Ranchers' own arguments in support of their alleged good faith negotiation, they said, "Well, we've got a pipeline there. Can we purchase the easement from you?" Tr., 10/13/2010, p. 75, LL. 22-23. Don Cain's rendition of his discussion with Mr. Telford was slightly different when he addressed the court at the preliminary injunction hearing:

> He [Telford] says, "We can give you $91 or we can file eminent domain."

Tr., 5/19/2010, p. 17, LL. 3-4. Both the U.S. Constitution and Idaho's Constitution provide that private property may not first be taken without due process of law. This Court has previously

held that a condemnor is not entitled to possession of the premises in an ordinary condemnation action until after commencement of the litigation. *Lobdell v. State ex. Rel Board of Highway Directors*, 89 Idaho 559, 407 P.2d 135 (1965). The Cains contend that the Ranchers failed to comply with Title 7 of the Idaho Code in that regard.

The lack of a legal description in the Ranchers' Complaint has been thoroughly briefed by the Cains. The first time the issue ever arose was during oral arguments on the hearing for reconsideration. It is also very apparent that the Ranchers themselves acknowledged this shortcoming when they filed their Motion to Amend Complaint pursuant to I.R.C.P. Rule 15(a) on October 5, 2011 (R., Vol. 6, p. 1109-1114), six days after the Judgment was filed. *Id.* at p. 1078.

The Ranchers have offered no explanation as to why their prayer for relief sought an order of condemnation determining that Twin Lakes should be entitled to an award of an easement across the Cains' property through eminent domain proceedings. Suffice it to say, the Cains contend that the Ranchers have treated a very serious matter requiring strict compliance with the law as something that can be treated cavalierly. In *McKenney v. Anselmo,* 91 Idaho 118, 416 P.2d 509 (1966), this Court stated:

> The applicable rule of statutory construction is set forth in 26 Am.Jur.2d, Eminent Domain, 18, pp. 659-661 and essentially is as follows:
>
> A grant of the power of eminent domain, which is one of the attributes of sovereignty most fraught with the possibility of abuse and injustice, will never pass by implication; and when the power is granted, the extent to which the power exercised is limited to the express terms or clear implication of the statute in which the grant is contained. In other words, **statutes conferring**

> **the power must be strictly construed.** Clear legislative authority must be shown to justify the taking. Authority cannot be implied or inferred from vague or doubtful language. When the matter is doubtful, it must be resolved in favor of the property owner.

(Emphasis added). 91 Idaho at 123. As Don Cain stated at the preliminary injunction hearing, "But I am here because this is important to me. This is my land. I worked all my life for what I have." Tr., 5/19/2010, p. 18, LL. 11-13. It is abundantly clear that the Ranchers failed to comply with Title 7 of the Idaho Code.

F. Standing of Telford Lands LLC.

The Ranchers contend that Telford, as the lessee of a now-expired water bank lease, had standing to assert an eminent domain claim against the Cains. No law has been cited for the proposition that a lessee has standing to engage in an eminent domain proceeding. Given their recitation of the applicability of *Canyon View Irrigation, supra,* to the facts of this case, it appears that certain segments of that opinion have been ignored by the Ranchers. In *Canyon View*, the Court stated, "In order to assist **owners of water rights** whose lands are remote from the water source, the state has partially delegated its powers of eminent domain to private individuals." (Emphasis added). 101 Idaho at 607. Continuing, this Court stated:

> To condemn such a right of way, **the water right owners** must proceed under Idaho's law of eminent domain, found in I.C. §§ 7-701, et seq.

(Emphasis added). *Id.* Telford testified in his deposition on July 12, 2012, that he had only a two-year water bank lease, but that prior to its execution, he had no point of diversion for any water rights in either the Old Moss Well or the P.U. Well. Telford Deposition, p. 22, LL. 22-25 and p. 23, LL. 1-12, R., Vol. 2, p. 321. The Cains contend that Telford lacked standing to seek a

permanent easement on the Cains' property through eminent domain in a fact situation such as this.

G. Attorney Fees Below.

Had the prevailing party analysis been appropriately applied by the district court to the three claims of the Ranchers that were rejected, the Cains would properly have been awarded their costs and attorney fees. Cains contend that it was erroneous to apply the prevailing party determination to the eminent domain proceeding, all as more specifically set forth in their opening Brief. If the Court reverses the trial court's decision on eminent domain, the Cains will clearly be the prevailing party.

H. Attorney Fees on Appeal.

Far from being an invitation for this Court to second-guess the evidence, the Cains contend that the review by this Court presents an opportunity to apply the facts and law to reach an entirely different resolution of the Ranchers' eminent domain claim. The Cains have asserted error on the part of the trial court in reaching a number of conclusions to establish the propriety of an award of eminent domain. The Ranchers have concluded their Brief by asserting that they were forced to file this lawsuit based upon Mr. Cain's action of self-help. These contentions on the part of the Ranchers seem a bit like the pot calling the kettle black. The Ranchers first trespassed and self-helped themselves by installing their pipeline on the BLRID right-of-way and in the BLRID culvert. When their trespass action resulted in the filing of a lawsuit by the BLRID, the Ranchers simply self-helped themselves a second time by trespassing on the Cains' property and installing their pipeline. Despite their own attorney's notes that the Ranchers

needed perpetual easements to protect themselves, the Ranchers took what they wanted through trespass, and then claimed a year later that they had a right to it through eminent domain. In other words, they made that bold, physical move to gain possession of a real property interest through their own forceful action. Given the facts of this case, attorney fees on appeal would appropriately be awarded to the Cains pursuant to Idaho Code § 12-120 and I.A.R. Rule 41 in the event of a reversal of the district court's decision on the eminent domain issue.

III. CONCLUSION

In their own conclusion, the Ranchers refer to "the superior system they have constructed" which has provided them "with their enhanced ability to farm." Respondents' Brief at p. 43. These statements in their Brief are consistent with the Ranchers' positions argued to the district court, i.e., a license agreement was not good enough for them, and they wanted their own "superior" real property interest. The Ranchers have acknowledged that the license agreements with BLRID have worked for thirty years, and further acknowledged that they are still operating with five other license agreements in the Moore Canal for the delivery of other water rights they hold. Given other statements in their Brief, the Ranchers appear poised to assert new eminent domain claims due to "an inferior delivery system" for their other water rights. Respondents' Brief at p. 28. With the deposition testimony of James Rindfleisch, it can only be concluded that the Ranchers voluntarily sought termination of two of their seven license agreements in order to invoke the theory of eminent domain. It was a matter of mere convenience and little more. As expressly acknowledged by the Ranchers in their own discovery responses:

> Without all three partners involved, the project would not have been undertaken as the participation of all three individuals/entities was necessary to make the project economically feasible.

R., Vol. 8, p. 1453. Telford admitted as much in his deposition when he stated that he needed partners to defray the cost of the project in order to make it all work. Telford Deposition, p. 22, LL. 10-21, R., Vol. 2, p. 436.

In addition to their total failure to comply with Title 7 of the Idaho Code, the Ranchers have not established the requisite necessity to maintain an eminent domain proceeding. The decision of the district court on this issue should be reversed with instructions to enter judgment in favor of the Cains. The matter should be remanded for a determination of costs and attorney fees at the district court level. Attorney fees should be awarded to the Cains on appeal.

RESPECTFULLY SUBMITTED this 16 day of October, 2012.

ROBERTSON &, SLETTE, PLLC

BY: _____
GARY D. SLETTE

CERTIFICATE OF SERVICE

The undersigned certifies that on the 16 day of October, 2012, he caused two (2) bound true and correct copies of the foregoing instrument to be served upon the following persons in the following manner:

Robert L. Harris	[ ]	Hand Deliver
Holden, Kidwell, Hahn & Crapo, PLLC	[x]	U.S. Mail
P.O. Box 50130	[ ]	Overnight Courier
Idaho Falls, ID 83405-0130	[ ]	Facsimile Transmission - 208-523-9518
	[ ]	Email rharris@holdenlegal.com

Gary D. Slette

BIG LOST RIVER IRRIGATION DISTRICT
P.O. BOX 205 · MACKAY, IDAHO 83251 · (208) 588-2231 · FAX: (208) 588-2863

October 7, 2009

Don Cain
PO Box 927
Moore, Idaho 83255

Dear Don,

This letter is a follow up to our phone conversation on October 6, 2009 where you requested information on delivery of water from ground water right #34-13841 belonging to Mitch Sorenson.

Water can be delivered from that well to the Moore Canal as it has been done in the past. When a well is pumped into a canal belonging to the Big Lost River Irrigation District (BLRID), a Transport Agreement with the BLRID is required. At present, this water right does not have a Transport Agreement and would require one in order to transport this well water to the place of use. It would also require an assessment be paid to the District for the land on which it is used.

At present, there is an existing Transport Agreement for water rights #34-2332 and #34-7079 belonging to PU Ranch LTD which historically has been used in the Moore Canal for transport of water to the place of use. These rights are pertinent to the same well as Sorenson partly owns.

If there are any questions, please give me a call at 390-1447.

Sincerely,

James Rindfleisch, Mgr
Big Lost River Irrigation District